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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-879

J. H. RUTTER REX MANUFACTURING COMPANY, INC.

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented for review	3
Statute involved	3
Statement of the case	3
Summary of reasons of the courts below	7
Argument	10
Conclusion	23
Certificate	25
Appendices	26-41
Appendix A., Opinion of the Fifth Circuit Court of Appeals	26
Appendix B., Opinion of the United States District Court for the Eastern District of Louisiana	33
Appendix C., Judgment of the District Court	38
Appendix D., Judgment of the Fifth Circuit Court of Appeals	39
Appendix E., Notice of Denial of Rehearing	41

TABLE OF AUTHORITIES

CASES: Page

Board of Comm'rs of Port of N.O. v. Splendour Shipping Enterprises Co., Inc. La. , 273 So.2d 19 (1973) 15

Dahlstrom v. U.S., 228 F.2d 819 (8th Cir. 1956) 14, 16

Dalehite v. U.S., 346 U.S. 15 73 S.Ct. 956 (1953) 13, 16, 17, 18, 22, 23

Daniel v. United States, 426 F. 2d 281 (5th Cir. 1970) 16

Deering Milliken, Inc. v. Johnston, 295 F. 2d 856 (4th 1961) 12

Donaldson v. United States 400 U.S. 517, 91 S.Ct. 534 (1971) 10

Eastern Air Lines v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955), aff'd 350 U.S. 907, 76 S.Ct. 192 (1955) 16

Fair v. U.S., 234 F.2d 288 (5th Cir. 1956) 14, 16

Feres v. United States, 340 U.S. 135, 71 S.Ct. 153 (1950) 17

Four Star Aviation, Inc. v. United States, 409 F. 2d 292 (5th Cir. 1969) 16, 17

Griffin v. United States, 500 F. 2d 1059 (3rd Cir. 1974) 14, 19

TABLE OF AUTHORITIES (Continued)

CASES: Page

Hatahley v. United States, 351 U.S. 173, 76 S.Ct. 745 (1956) 16

Hendry v. U.S., 418 F.2d 774 (2d Cir. 1969) 14

Hester v. Sanderson 172 So. 565 (La. App. 2nd 1937) .. 14

Indian Towing Co. v. U.S., 350 U.S. 61, 76 S.Ct. 122 (1955) 14, 16

J. H. Rutter Rex Manufacturing Company, Inc. v. United States, 515 F. 2d 97, 89 LRRM 2811 (5th Cir. 1975) 2

J. H. Rutter Rex Manufacturing Company, Inc. v. NLRB, 399 F.2d 356 (5th Cir. 1968) 2, 6, 9, 12

J. H. Rutter Rex Manufacturing Company, Inc. v. NLRB, 473 F.2d 223 (5th Cir. 1973) cert. denied, 414 U.S. 822, 94 S.Ct. 120 (1973) 2

J. H. Rutter Rex Manufacturing Company, Inc. v. U.S., 380 F.Supp. 412, 86 LRRM 2540 (E.D.La. 1974) 2

Laird v. Nelms, 406 U.S. 797, 92 S.Ct. 1899 (1972) .. 17, 21

Langlois v. Allied Chemical Corp., 258 La. 1067, 249 So. 2d 133 (1971) 14

Lawyer's Title Ins. Corp. v. Pitre, 245 F.2d 334 (5th Cir. 1957) 14

TABLE OF AUTHORITIES (Continued)

CASES: Page

Moyer v. Martin Marietta Corp. 481 F.2d 585 (5th Cir. 1973) 17

NLRB v. J. H. Rutter Rex Manufacturing Company, Inc., 245 F.2d 594 (5th Cir. 1957) 2, 5, 12

NLRB v. J. H. Rutter Rex Manufacturing Company, Inc. 305 F.2d 242 (5th Cir. 1962) 9

NLRB v. J. H. Rutter Rex Manufacturing Company, Inc., 396 U.S. 258, 90 S.Ct. 417 (1969) 2, 6, 10

Nelms v. Laird, 442 F.2d 1163 (4th Cir. 1971) 21

Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 61 S.Ct. 845 (1941) 11

Pigott v. United States, 451 F. 2d 574 (5th Cir. 1971) .. 17

Quinones v. United States, 492 F. 2d 1269 (3rd Cir. 1974) 15

Roelofs v. United States, 501 F. 2d 87 (5th Cir. 1974) .. 14

Rayonier, Inc. v. U.S., 352 U.S. 315, 77 S.Ct. 374 (1957) 13, 17

Rutter Rex Mfg. Co., 115 NLRB 388 (1956) 4

Seaboard Coast Line Railroad Co. v. U.S., 473 F.2d 714 (5th Cir. 1973) 16

Smith v. U.S., 375 F.2d 243 (5th Cir. 1967) 16, 17

TABLE OF AUTHORITIES (Continued)

CASES: Page

Somerset Seafood Co. v. U.S., 193 F.2d 631, (4th Cir. 1951) 13, 14, 21

Tucker v. Edwards, 214 La. 560, 38 So.2d 241 (1948) 14

United States v. Muniz, 374 U.S. 150, 83 S.Ct. 1850, (1963) 13, 17

Universal Camera Corp. v. NLRB, 340 U.S. 474, 71 S.Ct. 456 (1951) 10

Wallace Corporation v. NLRB, 159 F.2d 952, (4th Cir. 1947) 12

Weiland v. King, 262 La. 1083, 281 So.2d 688 (1973) 14

OTHER AUTHORITIES

Page

Statutes:

Administrative Procedure Act

(60 Stat. 237) 5 U.S.C. §1005(a) (1964 ed.) 9

5 U.S.C. §555(b) (1966) 9, 12

Federal Tort Claims Act

28 U.S.C. §1346(b) 1, 4, 7, 30, 32

28 U.S.C. §2674 ..... 29, 35

28 U.S.C. §2680 ..... 1, 8, 9, 24, 30, 32, 37

National Labor Relations Act

29 U.S.C. §160 ..... 10, 12

Wreck Acts

33 U.S.C. §409 14

Louisiana Civil Code (1870), Articles 2315, 2316, 2317 .. 14

Rules and Regulations:

National Labor Relations Board 29 C.F.R. §101 12

National Labor Relations Board Field Manual §10500 through 10520 12

OTHER AUTHORITIES (Continued)

Page

National Labor Relations Board 32 F.R. 9588 §203.1, amended by 37 F.R. 15956 12

Miscellaneous:

APA Legislative History, S. Doc., No. 248, 79th Congress 2nd Sess. 263-264 13

Reynolds, "The Discretionary Function Exception of the Federal Tort Claims Act" 57 Georgetown L.J. 81 (1968) 19

Rothman, "Four Ways to Reduce Administrative Delay," 28 Tenn. L. Rev. 332 (1961) 12

Stone, "Tort Doctrine in Louisiana: The Concept Fault," XXVII Tulane L. Rev. 1 (1952) 15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No.

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Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MAY IT PLEASE THE COURT:

J. H. Rutter Rex Manufacturing Company, Inc., petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit which affirmed the judgment of the United States District Court for the Eastern District of Louisiana dismissing the suit of petitioner under the Federal Tort Claims Act, 28 U.S.C. §1346(b), §1402(b), §§2671-2680, et seq.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 515 F. 2d 97, 89 LRRM 2811 (5th Cir. 1975) and is appended hereto as Appendix A, pages 26-32, *infra*. The opinion of the district court is reported at 380 F. Supp. 412, 86 LRRM 2540 (E.D. La. 1974) and is appended hereto as Appendix B, pages 33-37, *infra*. The judgment of the district court dated April 30, 1974 is appended hereto as Appendix C, page 38, *infra*. Other opinions which are relevant to this Court's consideration because they form part of the background of this controversy are:

NLRB v. J. H. Rutter Rex Manufacturing Company, Inc., 396 U.S. 258, 90 S.Ct. 417 (1969);

J. H. Rutter Rex Manufacturing Company, Inc. v. NLRB, 473 F. 2d 223 (5th Cir. 1973), certiorari denied 414 U.S. 822, 94 S.Ct. 120 (1973);

J. H. Rutter Rex Manufacturing Company, Inc. v. NLRB, 399 F. 2d 356 (5th Cir. 1968);

NLRB v. J. H. Rutter Rex Manufacturing Company, Inc., 305 F.2d 242 (5th Cir. 1962)

NLRB v. J. H. Rutter Rex Manufacturing Company, Inc., 245 F. 2d 594 (5th Cir. 1957).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) which provides that cases in the Courts of Appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. The judgment of the Court of Appeals was dated June 30, 1975 and entered as mandate on October 3, 1975 (Appendix D, p. 39, *infra*). On September 25, 1975, the Court of Appeals denied a timely petition for rehearing *en banc* filed by J. H. Rutter Rex Manufacturing Company, Inc. (Order denying rehearing pursuant to advice letter annexed as Appendix E, page 41, *infra*).

QUESTION PRESENTED FOR REVIEW

The question presented for review is whether, in a case in which a federal agency's prompt performance of its duty is required by statute, regulation and precedent, and where the failure to perform the duty promptly results in consequential damages to a party before the agency, the discretionary function exception to the Federal Tort Claims Act insulates the United States from liability to compensate the injured party for the damages sustained.

STATUTE INVOLVED

This case involves the interpretation of the discretionary function exception to the Federal Tort Claims Act which appears at 28 U.S.C. §2680(a) and states,

> "The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

STATEMENT OF THE CASE

This case was submitted to the district court on a stipulation of facts, a copy of which (exclusive of exhibits) is appended to the district court's opinion and is printed in its entirety at 380 F.Supp. 414. The stipulation and

certain designated exhibits also appears at J.A. 37-148.[1]

This civil action was commenced by petitioner in the district court under the Federal Tort Claims Act to recover damages which were sustained as the result of negligent and wrongful acts and omissions of employees of the National Labor Relations Board (hereinafter the "Board"). The jurisdiction of the district court was based upon 28 U.S.C. §1346(b) which provides in part that—

> ". . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[2]

On April 21, 1954, the production and maintenance employees of the Rutter Rex plant in New Orleans (approximately 600 people) went on strike shutting down the entire operation. These employees were members of the Amalgamated Clothing Workers of America, AFL-CIO. The strike was economic in origin but was later held by the Board to have been converted to an unfair labor practice strike on technical grounds reflected in the decision of the Board in *Rutter Rex Mfg. Co.*, 115 NLRB 388 at page 390

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[1] This and other "J.A." references are to the Joint Appendix filed in the circuit court which document is being certified and transmitted to this Court pursuant to Supreme Court Rule 21, at the request of petitioner. References herein to "Stip." accompanied by a "J.A." reference are to particular paragraphs of the Stipulation of Facts upon which this case was decided and to the Joint Appendix page where the paragraph is found.

[2] Venue was properly in the Eastern District of Louisiana pursuant to 28 U.S.C. §1402(b).

(1956). (Stip. I—J.A. 37) The strike was terminated on April 4, 1955, and thereafter strikers who had not already been reinstated began applying for reinstatement to their former jobs (Stip. IV—J.A. 38). When the strike terminated, Rutter Rex began the difficult task of rebuilding the balanced line operations of its plan (Stip. V, Exhibit 1—J.A. 39, 66). On February 13, 1956, the Board issued an order which required Rutter Rex to ". . . upon application offer immediate and full reinstatement to their former or substantially equivalent positions to all those employees who went on strike on April 21, 1954, or thereafter . . ." (115 NLRB 388, 391; Stip. VI, VII). The Fifth Circuit enforced the Board's order on June 10, 1957). *NLRB v. J. H. Rutter Rex Manufacturing Company*, 245 F. 2d 594 (5th Cir. 1957).

Rutter Rex agreed to comply with the order as enforced (Stip. XI, XII, XIV, XV, Exhibits 6, 7, 9, 10, 11—J.A. 43, 44, 45, 101, 102, 104, 105, 111). However the reinstatement order raised complex compliance issues which were recognized by the circuit court in 1957 (245 F. 2d at p. 598; Exhibit 1, Stip. VI, VII—J.A. 66, 39, 41).

After enforcement of the reinstatement order, the Board was under the legal duty to act administratively to implement the order as enforced. However, for nearly four and one-half years after the circuit court's enforcing opinion, the Board did not act. During most of this period the case lay dormant in the Board's hands while Rutter Rex was under the impression that its compliance efforts were satisfactory to the Board. (Stip. VIII, XXI, XXXIII—J.A. 47, 48, 50).

On November 4, 1961, the Board filed a backpay specification against Rutter Rex demanding $342,000 in backpay allegedly due to 207 former strikers (Stip. XXIX—

J.A. 55). After a lengthy hearing, backpay and interest totalling $160,894.69 was awarded. On July 23, 1968, the circuit court modified the Board's award because of the Board's inordinate delay in processing the case. *J. H. Rutter Rex Manufacturing Company, Inc. v. NLRB*, 399 F. 2d 356 (5th Cir. 1968). However, this Court reversed and reinstated the full award, not because this Court disagreed with the circuit court's finding that the Board had been guilty of unjustifiable delay, but because the circuit court's modification of the Board's order exceeded the narrow reviewing power of that court. *NLRB v. J. H. Rutter Rex Manufacturing Company, Inc.*, 396 U.S. 258, 263, 90 S.Ct. 417, 420, (1969). Mr. Justice Douglas, with whom The Chief Justice and Mr. Justice Harlan concurred, dissented, being of the view that the circuit court had properly approached the case as a problem in ". . . working out the equities of a back-pay order" and that the circuit court had ". . . arrived at its judgment as an exercise of its responsibility 'for assuring that the Board keeps within reasonable bounds' . . . in an area that necessarily involves 'diverse, complicated situations.'" (396 U.S. at p. 267-268).

Thereafter, a supplemental backpay claim was filed (Stip. XXXII, XXXIII—J.A. 61, 62) for which additional damages are claimed in this action. (Paragraph IX of complaint, J.A. 4).

It is the position of Rutter Rex that the Board was guilty of misfeasance in the performance of, and nonfeasance in failing to perform, its mandatory duties causing the damages complained of[3] and that the United States

[3] The damages demanded are $144,001.24 plus interest and costs. This was computed from an analysis and breakdown of backpay and interest paid to 38 claimants as contained in paragraphs XXXII and XXXIII

is liable for such damages because the Government's traditional immunity from tort suit was waived to the extent of such "negligent or wrongful acts or omissions." 28 U.S.C. §§1346(b), 2674.

The Government answered the suit and filed a motion to dismiss based upon the discretionary function exception. This motion was denied by the district court on December 21, 1973 (J.A. 37). On April 30, 1974, the district court issued an order dismissing the suit and assigning written reasons (Appendix B, *infra*).

SUMMARY OF REASONS OF THE COURTS BELOW

The district court and circuit court opinions are based solely on the discretionary function exception of 28 U.S.C. §1346(b).

The district court held:

> "After careful consideration of the matter, it is the opinion of the Court that the delay in completing the back pay specification on the part of the Board was "inordinate" and "deplorable", and that plaintiff company was in fact damaged both in its ability to defend the specification finally filed and by the increased amount of the required payments occasioned by the delay. However, the Court is also of the opinion that the situation

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and Exhibit 28 of the stipulation (J.A. 61-62, 139). This analysis shows the tremendous impact of the Board's delay. By the end of June, 1957 when the Fifth Circuit enforced the Board's reinstatement order, only 38 persons, 6.3% of the original strike force, remained to be dealt with for reinstatement and backpay purposes. Of the total of $243,209.20 backpay and interest paid to 161 claimants who were found eligible to receive backpay, $144,001.24 went to the 38 claimants. Thus, 59% of all backpay went to 23% of the eligible claimants, for claims running beyond June 30, 1957, that is, during the period of the Board's delay.

at bar is illustrative of the principle of *damnum absque injuria.* Plaintiff has failed to provide, and the Court has been unable to find, any authority which supports plaintiff's contention that unreasonable delay in violation of the dictates of the Administrative Procedure Act renders defendant liable in damages under the Tort Claims Act. On the contrary, it is the opinion of the Court that the action of the agency in allocating its enforcement case load was an act of discretion within the meaning of 28 U.S.C. §2680(a). Eastport Steamship Corp. v. United States, 372 F.2d 1002, 178 Ct.Cl. 599 (1967); Coastwise Packet Co. v. United States, 398 F.2d 77 (C. 1, 1968), cert. den'd 393 U.S. 937, 89 S.Ct. 300, 21 L.Ed.2d 274 (1968).

While the length of the delay in this case was deplorable, it is the Court's opinion that it was just this type of governmental liability which the Congress sought to avoid by means of the exception contained in 28 U.S.C. §2680." (Appendix B, page 36, *infra*) [footnotes omitted].

In its affirming opinion, the circuit court held:

"The Board elected to have new and inexperienced member Champagne "cut his teeth" on smaller compliance matters before handling the Rutter Rex case, a major back pay case. This decision clearly involved public policy considerations—balancing of various cost-benefit considerations to advance the public interest. The NLRB could clearly have thought it was in the public interest to have Champagne gain experience before taking on the Rutter Rex case to insure full compliance with the back pay order in the major case. Thus the trial court correctly held that the discretionary function exception applied even if the NLRB abused its discretion in this case. See

28 U.S.C. §2680(a)." (Appendix A, page 31, infra).[4]

REASONS FOR GRANTING THE WRIT

The holdings of the district court and of the circuit court both proceed from the erroneous view that the decision making process of the Board in handling its compliance caseload includes the discretion to violate the law. If allowed to stand, these holdings will preclude any finding of agency responsibility notwithstanding the fact of damage resulting from unwarranted official delay. This can and will lead to lax standards of care by federal agency personnel in the handling of matters entrusted to them. This is against the principles of federal administrative law embodied in the Administrative Procedure Act [60 Stat. 237, 5 U.S.C., §1005(a) (1964 ed.), amended 5 U.S.C., §555(b) (1966 ed.)]. This Court should decide whether and under what circumstances unwarranted official delay by an administrative agency can subject the United States to liability for damages. This is not a matter upon which this Court has previously ruled.

Furthermore, a decision by this Court on the scope of the discretionary function exception of the Federal Tort

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[4] The statement that the Board "could clearly have thought" that its "decision" was in the "public interest" is one with which petitioner takes strong exception. This argument is not supported by the stipulation or by any part of the record and has been injected into the case solely by the circuit court. The Board never contended in any related case and the United States did not contend in the district court in this case that its delay was justified on any public interest grounds. It is stipulated that the assignment of the case to Champagne was "a paper assignment" with the Board's regional personnel fully aware that Champagne could not and would not carry it out. (J.A. 30; Stip. XXI—J.A. 48). In 1962, the Board *admitted* to the circuit court that its delay was inordinate, *NLRB v. J. H. Rutter Rex Manufacturing Company, Inc.*, 305 F. 2d 242, 244 (5th Cir. 1962) and even conceded in 1968 that it was "red faced" about the delay. *J. H. Rutter Rex Manufacturing Company, Inc. v. NLRB*, 399 F. 2d 356 (5th Cir. 1968) at transcript of oral argument, page 58. The Board has never considered its own conduct as other than culpable.

Claims Act is necessary because the circuit courts have differed in their interpretations of the exception. See *Donaldson v. United States*, 400 U.S. 517, 91 S.Ct. 534 (1971).

ARGUMENT

Except for some provisions of law which would insulate the Government from liability for its wrongful acts, every relevant equity and public policy consideration supports the principle that a person who is damaged at the hands of a government agency should be recompensed. For agencies like the Board, which perform quasi judicial functions affecting the rights and property of the parties appearing before them, there are legal provisions for judicial review intended to assure that the agency acts fairly. In the case of the Board, its decisions are reviewable by the courts of appeals pursuant to 29 U.S.C. §160. By this provision, Congress ". . . registered its dissatisfaction with . . . restricted scope of review . . ." and intended that the courts of appeals " '. . . assume more responsibility for the reasonableness and fairness of Labor Board decisions . . .' " and that the courts assure " '. . . . that the Board keeps within reasonable bounds.' " *NLRB v. J. H. Rutter Rex Manufacturing Company, Inc.*, 396 U.S. 258, 267, 90 S.Ct. 417, 422 (1969) (dissenting opinion); *Universal Camera Comp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456 (1951). In the backpay phase of this case, these provisions for judicial review were not adequate to repair the damage to Rutter Rex by reason of the Board's unwarranted delay, because the backpay case involved the competing interests of the employee-claimants and, in balancing these interests against those of Rutter Rex, this Court decided that Rutter Rex must bear the cost of the Board's delay. (396 U.S. at page 263, 90 S.Ct. at page 420). In the instant

case, no such competing interests are involved. In this case the responsibility for the Board's delay can be placed squarely where it belongs—on the Government.

In *Phelps Dodge Corporation v. NLRB*, 313 U.S. 177, 194, 61 S.Ct. 845, 852 (1941), this Court, speaking through Mr. Justice Frankfurter, said,

> "A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application . . . Congress met these difficulties [of effectuating the Act's policies] by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy. *On the other hand, the power with which Congress invested the Board implies responsibility—the responsibility of exercising the judgment in employing the statutory powers.* [Brackets and emphasis added].

It follows that once policy has been determined, the responsibility for implementing the policy pursuant to the statutory mandate is no less stringent and must be undertaken expeditiously.

The following provision of the Administrative Procedure Act was in effect at the time the Board considered the compliance phase of this case:

> "Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives.[5]

A former General Counsel of the Board has written:

> ". . . to discharge its mission an administrative agency must have the confidence of the public it serves, and the first step toward earning such confidence again lies in the expeditious dispatch of the business entrusted to it. . . ." Rothman, *Four Ways to Reduce Administrative Delay*, 28 Tenn. L. Rev. 332, 332-3 (1961).

The underlying principle in support of these statements is stated in the legislative history of the Administrative Procedure Act, to-wit:

> ". . . No agency shall in effect deny relief or fail to conclude a case by mere inaction, or proceed

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[5] 60 Stat. 237, 5 U.S.C. §1005(a) (1964 ed.). This section was redesignated 5 U.S.C. §555(b) by a 1966 amendment which carried forward the principle of expeditiousness by requiring each agency to conclude matters before it "within a reasonable time." Compliance cases are committed to the Board's responsibility (29 U.S.C. §160) and the Court's have required that the Board meet its responsibilities through appropriate administrative action. *Wallace Corporation v. NLRB*, 159 F. 2d 952 (4th Cir. 1947). Such action was mandated in this case in 1957 when the circuit court wrote that the resolution of the numerous questions involved in compliance with the backpay order as enforced ". . can come either in future administrative proceedings before and through the Board or in direct contempt proceedings. . . ." *NLRB v. J. H. Rutter Rex Manufacturing Company, Inc.*, 245 F. 2d 594, 598 (5th Cir. 1957). Board regulations show the Board's awareness of its responsibility. 29 FR §101 states, "After a Board order has been enforced by a Court decree, the Board has the responsibility of obtaining compliance with that decree." This responsibility has been delegated by the Board to its Regional Directors. 32 F.R. 9588—§203.1, as amended by 37 F.R. 15956. Furthermore, the discharge of this responsibility must be undertaken "immediately". See National Labor Relations Board Field Manual, U.S. Govt. Printing Office, §§10500 through 10520 at §10504.4. These duties are owed to all parties before the Board who have the ". . . legal right to expect the Board to proceed with reasonable expedition." *J. H. Rutter Rex Manufacturing Company, Inc. v. NLRB*, 399 F. 2d 356, 363 (5th Cir. 1968) Rev'd on other grounds, 396 U.S. 258, 90 S.Ct.417 (1969); see *Deering Milliken, Inc. v. Johnston*, 295 F. 2d 856 (4th Cir. 1961).

> in a dilatory fashion to the injury of the person concerned. *No agency should permit any person to suffer injurious consequences upon unwarranted official delay. APA Legislative History*, S. Doc. No. 248, 79th Congress, 2nd Sess., 263-264. [Emphasis added].

The district court found that Rutter Rex is a person injured as a consequence of unwarranted official delay in violation of this principle. The scope of the Federal Tort Claims Act is broad enough to provide a remedy for this wrong. In *Dalehite v. United States*, 346 U.S. 15, 24, 73 S.Ct. 956, 961 (1953) this Court wrote that the Act ". . . was the offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work." Also, the Act ". . . was not an isolated and spontaneous flash of congressional generosity. It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit." *Somerset Seafood Co. v. United States*, 193 F. 2d 631, 634 (4th Cir. 1951). "[T]he very purpose . . . was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability. . . ." *Rayonier Incorporated v. United States*, 352 U.S. 315, 319-320, 77 S. Ct. 374 377 (1957); *United States v. Muniz*, 374 U.S. 150, 83 S. Ct. 1850 (1963).

The liability which Rutter Rex seeks to impose upon the Government is neither novel nor unprecedented. This cause of action is based upon the Board's violation of statutory and regulatory mandates—its failure to follow established standards applicable to its administrative obligations (see footnote 5 *supra*). Actions based upon such violations of duty have succeeded. *Somerset Seafood Co. v. United States, supra*, (violation of the mandatory duty im-

posed by the Wreck Acts, 33 U.S.C. §§409 et seq, to mark or remove sunken ships in navigable waters); *Fair v. United States*, 234 F. 2d 288 (5th Cir. 1956) (where the Court stated, ". . . the government is liable for the actions of its employees dealing directly with the public in the application of established policies . . . 234 F. 2d at p. 294); *Griffin v. United States*, 500 F. 2d 1059 (3rd Cir. 1974) at page 1068; Cf. *Hendry v. United States*, 418 F. 2d 774 (2nd Cir. 1969).

It is well established that the existence of private activity identical to the governmental function involved is not a condition precedent to the bringing of an action under the Federal Tort Claims Act. *Indian Towing Company v. United States*, 350 U.S. 61, 76 S.Ct. 122 (1955); *Somerset Seafood Co. v. United States, supra;* See also *Roelofs v. United States*, 501 F. 2d 87 (5th Cir. 1974); *Fair v. United States, supra; Dahlstrom v. United States*, 228 F. 2d 819 (8th Cir. 1956),

Louisiana tort law has long recognized a cause of action for damages against a public officer who knowingly or negligently fails to perform a ministerial or administrative duty which he is required by legal authority to perform. See *Tucker v. Edwards*, 214 La. 560, 38 So.2d 241 (1948); *Hester v. Sanderson*, 172 So. 565 (La. App. 2nd 1937); *Lawyer's Title Ins. Corp. v. Pitre*, 245 F. 2d 334 (5th Cir. 1957). The tort doctrine in Louisiana which is embodied in Articles 2315, 2316 and 2317 of the Louisiana Civil Code of 1870 is flexible in its application to new circumstances and is broad enough to embrace conduct which falls below a proper standard of care as established by statute, ordinance, rule, regulation, code, received usage, custom or equity. *Weiland v. King*, 262 La. 1083, 281 So. 2d 688 (1973); *Langlois v. Allied Chemical Corp.*, 258 La.

1067, 249 So. 2d 133 (1971); Stone, *Tort Doctrine in Louisiana: The Concept of Fault*, XXVII Tulane L. Rev. 1 (1952). Louisiana is particularly sensitive to the concept of government responsibility for its wrongs which it commits, as the following quotation from the decision which abolished the doctrine of sovereign immunity as applied to the State and its agencies, points out:

> "Governmental responsibility is needed more today than ever. There is hardly any sector of private life and activity free from governmental intervention. The myriad State agencies and their employees almost defy inventory, to say nothing of control by the people whom they purport to serve. It has not been the policy of the legislature to permit employees of agencies to injure, intentionally or carelessly, private citizens. It is and should be the policy of the State, enforced through its courts, to require boards and agencies to act responsibly, or be subject to answer in court." *Board of Comm'rs. of Port of N. O. v. Splendour Shipping Enterprises Co., Inc.*, ... La. ....., 273 So. 2d 19, 25-26 (1973).

It is clear that the specific and general tort theories of Louisiana support recovery in this case. See *Quinones v. United States*, 492 F.2d 1269 (3rd Cir. 1974).

Notwithstanding these principles of Federal and State law, the circuit court, relying upon the view that the Board had discretion to violate its duty by unreasonable and inordinate delay in handling the Rutter Rex case, affirmed the dismissal of this action. It is not clear why the circuit court felt compelled to affirm. The Board's decision to pretermit this case was a relatively low level decision, involving only the limited, insignificant consideration of training a new employee during a period when the

local Board office was understaffed. This was not the type of decision which the Fifth Circuit had previously considered immune from attack, such as in *Smith v. United States*, 375 F. 2d 243 (5th Cir. 1967), involving a prosecutorial decision of the Attorney General which the court considered an area of fundamental national policy. See also *Four Star Aviation, Inc. v. United States*, 409 F. 2d 292 (5th Cir. 1969) (a foreign policy decision).

This Court first considered the discretionary function exception in *Dalehite v. United States*, supra. In *Dalehite*, the exception was considered in the light of a distinction drawn between the planning and operational functions of government, with immunity attaching to discretionary decisions at the planning level but not at the operational level. The Court noted that the exception includes ". . . determinations made by executives or administrators in establishing plans, specifications or schedules of operation. 346 U.S. at p.36, 73 S.Ct. at p.968). The planning operational distinction has been applied in several cases. E.g., *Indian Towing Co. v. United States, supra; Seaboard Coast Line R.R. Co. v. United States*, 473 F. 2d 714 (5th Cir. 1973); *Daniel v. United States*, 426 F. 2d 281 (5th Cir. 1970); *Fair v. United States, supra; Eastern Air Lines v. Union Trust Co.*, 221 F. 2d 62 (D.C. Cir. 1955), aff'd., 350 U.S. 907, 76 S.Ct. 192 (1955); *Dahlstrom v. U.S., supra.* Even applying this rule literally to the facts of the instant case, it is questionable that the suit should have been dismissed because here, no plan, no schedule of operation, was established or even attempted by the Board. The assignment of the case to Champagne in 1957 meant only that he should work on it "when he could find the time." (Stip. XXIII—at J.A. 52).

However, subsequent decisions of this Court in *Indian Towing Co. v. United States, supra; Hatahley v. United*

States, 351 U.S. 173, 76 S. Ct. 745 (1956) and *Rayonier, Inc. v. United States*, *supra*, [see also, *United States v. Muniz*, *supra*, but see, *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153 (1950) and *Laird v. Nelms*, 406 U.S. 797, 82 S.Ct. 1899 (1972)], have repeatedly been interpreted as narrowing *Dalehite's* broad interpretation of the exception. The Fifth Circuit Court of Appeals has led the way in holding that courts must reject an absolutist interpretation of the discretionary function exception and of *Dalehite*. *Moyer v. Martin Marietta Corp.*, 481 F. 2d 585 (5th Cir. 1973); *Pigott v. United States*, 451 F. 2d 574 (5th Cir. 1971); *Smith v. United States*, *supra*. This has resulted in some cases (including the instant case) of a rejection of the planning-operational distinction in favor of an *ad hoc* determination, on a case by case basis, rationalizing each decision on policy considerations. In *Smith*, *supra*, the court concluded that the planning-operational distinction—

> "may be a makeweight in easy cases where of course it is not needed, but in difficult cases it proves to be another example of a distinction 'so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation.'" *Smith v. United States*, *supra* at p. 246.

The results of this *ad hoc* approach have been mystifying. In *Smith*, *supra*, the court held that a cabinet level policy decision was not subject to attack. The result was the same in *Four Star Aviation, Inc. v. United States*, *supra*, involving international relations and foreign policy. On the other hand, in *Pigott v. United States*, *supra*, the court held that a decision as to the time of test firing, and the amount of thrust to be developed by a Saturn rocket, may not have been protected; and in *Moyer v. Martin Marietta*

Corp., *supra*, the court held that, although a decision by the Secretary of the Air Force selecting the B-57A as part of this country's armament was a discretionary function within the meaning of the Federal Tort Claims Act, the acceptance of the aircraft's systems such as the pilot ejection seat, a mechanism which posed a safety hazard to a person operating the aircraft, did not fall within the scope of the exception. The confusion in the jurisprudence requires clarification by this Court. ..

The only way that the cited cases can be reconciled is on the basis of the rule that once the exercise of immune discretion has resulted in the formulation of a policy, negligence or carelessness in carrying out that policy, at any level, is actionable. But, if this is the law, the decision in the instant case is clearly erroneous because the "policy" of imposing backpay liability was established administratively by the Board in its 1956 order. Thereafter, the policy was administered carelessly and wrongfully by those to whom the responsibility for implementing it, according to established standards, was assigned. There is nothing in the jurisprudence under this Act which justifies dismissal of a tort suit of an injured citizen against the Government not because the negligence on which the suit was based involves major national policy considerations, but because of "cost-benefit considerations" by an understaffed local office of an administrative agency which was merely deciding how to train a new employee.

The circuit court was a victim of the snare warned of by Mr. Justice Jackson in his dissent in *Dalehite v. U.S.*, *supra*, (346 U.S. at p. 50) where he wrote:

> "The Government, as a defendant, can exert an unctuous persuasiveness because it can clothe official carelessness with a public interest. Hence,

> one of the anticipated consequences of the Tort Claims Act has been to throw the weight of Government influence on the side of lax standards of care in negligence cases which it defends."

In the article by Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 Georgetown L. J. 81, 93-98 (1968), the author concludes, "where a duty to perform an act or to act in a particular manner, is imposed on the government by law, the government cannot be heard to argue it exercised discretion in failing to perform the duty, for it has no such discretion."

The decision in *Griffin v. United States*, 500 F. 2d 1059 (3rd Cr. 1974) recognizes and adopts the quoted principle. This same principle was ignored by the Fifth Circuit in the instant case and, therefore, the Third and Fifth Circuit opinions represent conflicting interpretations of the discretionary function exception.

Griffin involved a FTCA suit by plaintiffs who were damaged as the result of ingestion of polio vaccine which had been released to the public on the authority of the Division of Biologic Standards, Department of Health, Education and Welfare. HEW's Division was obligated by Federal Regulations to test the vaccine for safety prior to releasing it. The government contended that the determinations called for by the regulations involved the exercise of judgment and that the discretionary function exception of the FTCA insulated it from liability on claims " 'arising from acts of a regulatory nature.' " (500 F.2d at page 1063). This contention was rejected. The court's reasoning is illustrative of the principles relied upon by Rutter Rex. The court commented and held:

"At the outset, we emphasize what is not being challenged on this appeal. Plaintiffs do not challenge the Surgeon General's determination to approve a live-virus immunization program. Neither do plaintiffs challenge the regulation which established the standard against which all manufactured lots were to be measured. . . . These were matters involving balancing of policy considerations in advancing the public interest. Plaintiffs, in the instant case, challenge solely the manner by which the regulation was implemented. They contend that in approving a particular lot, Lot 56, for release to the public. DBS failed to comply with the standard established by the Surgeon General.

"The issue before us, therefore, is whether the implementation of regulation 73.114(b)(1)(iii) by DBS involved a 'discretionary function.' To decide this question we must first determine exactly what the regulation required be done in determining whether to release a particular lot." (500 F.2d at p. 1064)

* * *

"Where the conduct of Government employees in implementing agency regulations requires only performance of scientific evaluation and not the formulation of policy, we do not believe that the conduct is immunized from judicial review as a 'discretionary function.'" (500 F.2d at p. 1066)

* * *

"Even were we to concede that discretion was otherwise conferred upon DBS by the regulation, no discretion was conferred to disregard the mandatory regulatory command. In discounting test results that were required to be considered significant, DBS acted outside the scope of the

> authority conferred by the regulation. The violation of a non-discretionary command takes what otherwise might be characterized as a 'discretionary function' outside the scope of the statutory exception. . . . Although Congress has provided that activity within the authority of a Government official, if a 'discretionary function' may not be the basis of Government liability even if negligent or an abuse of discretion, Congress has not immunized such activity if it exceeds the authority conferred. Liability, in such cases, is predicated not on a negligent or unwise policy determination, but on the failure of Government employees to conform to and act consistently with the authority delegated. We do not hold that the Government may be liable for policy determinations made by its officials. Rather, we hold only that the Government may be liable where its employees, in carrying out their duties, fail to conform to pre-existing statutory and regulatory requirements." (500 F.2d at p. 1068)

In *Laird v. Nelms*, 406 U.S. 797, 92 S.Ct. 1899 (1972) this Court was presented with two issues under the Federal Tort Claims Act. The first concerned the coverage of the Act in cases where strict liability is alleged as opposed to cases of negligence or other form of misfeasance or nonfeasance. The second issue involved the scope of the discretionary function exception. Because the first issue was decided adversely to plaintiff, the second issue was not reached by the majority. The court of appeals had held, analogizing to the situation in *Somerset Seafood Co. v. United States*, *supra*, and citing *Reynolds*, *supra*, that where a regulation placed government employees under a duty to perform a mandatory act, the discretionary function exception does not afford the government a defense when it has disobeyed the command. *Nelms v. Laird*, 442 F. 2d 1163 (4th Cir. 1971).

Mr. Justice Stewart, with whom Mr. Justice Brennan joined, dissented from the majority opinion in *Laird*. Mr. Justice Stewart considered the discretionary function exception and concluded that it was inapplicable to the case. The following is quoted from the dissenting opinion:

> "The Assistant Attorney General who testified on the bill before the House committee indicated that this provision was intended to create no exceptions beyond those that courts would probably create without it:
>
> > '[I]t is likely that the cases embraced within that subsection would have been exempted from [a bill that did not include the exception] by judicial construction. It is not probable that the courts would extend a Tort Claims Act into the realm of the validity of legislation or discretionary administrative action, but [the recommended bill] makes this specific.' Hearings on H.R. 5373 and H.R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess., ser. 13, p. 29.
>
> "The *Dalehite* opinion seemed to say that no action of a Government employee could be made the basis for liability under the Act if the action involved 'policy judgment and decision.' 346 U.S., at 36, 73 S.Ct., at 968. Decisions in the courts of appeals following *Dalehite* have interpreted this language as drawing a distinction between 'policy' and 'operational' decisions, with the latter falling outside the exception. That distinction has bedeviled the courts that have attempted to apply it to torts outside routine categories such as automobile accidents, but there is no need in the present case to explore the limits of the discretionary function exception.

> "The legislative history indicates that the purpose of this statutory exception was to avoid any possibility that policy decisions of Congress, of the Executive, or of administrative agencies would be second-guessed by courts in the context of tort actions. There is no such danger in this case, for liability does not depend upon a judgment as to whether Government officials acted irresponsibility or illegally. Rather, once the creation of sonic booms is determined to be an activity as to which the doctrine of absolute liability applies, the only questions for the court relate to causation and damages. Whether or not the decision to fly a military aircraft over the respondents' property, at a given altitude and at a speed three times the speed of sound, was a decision at the 'policy' or the 'operational' level, the propriety of that decision is irrelevant to the question of liability in this case, and thus the discretionary function exception does not apply." (406 U.S. at page 810, 92 S.Ct. at page 1906) [footnotes omitted].

The warning of Mr. Justice Jackson in his dissenting opinion in *Dalehite* has proven prophetic. The distinction which Mr. Justice Stewart says has "bedeviled" the courts has led to irreconcilable results. There is no guide for future cases. The jurisprudence is two-pronged, one line following the planning-operational distinction, the other line the *ad hoc* policy determination route with the instant case and *Griffin* in conflict over the significance of policy considerations in the face of statutory and regulatory mandates.

CONCLUSION

There is no justification for permitting the Government to rely upon the discretionary function defense in any case

where policy has been established and the wrong occurs because mandated administrative action has been inordinately delayed. A contrary view is tantamount to saying that federal agencies have discretion to violate the law and ignore regulatory commands. The question here is not one of balancing policy considerations. The real question is whether the Board had any discretionary right to conduct its affairs in violation of a positive mandate in the law and the applicable regulations.

This area of dispute and doubt is important to the administration of the Federal Tort Claims Act by the lower courts. A majority of this Court has not authoritatively spoken on the subject or settled the issue. The differing interpretations by the circuit courts of 28 U.S.C. §2680(a), require this Court to grant review of this case on writ of certiorari.

Respectfully Submitted:

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CERTIFICATE

It is certified in accordance with Supreme Court Rules 21 and 33, that three copies of the foregoing petition for certiorari have been served on each of the individuals named below, by depositing same in a United States mail box, first class postage prepaid, or, if applicable, air mail postage prepaid, addressed as follows:

Solicitor General
United States Department of Justice
Washington, D. C. 20530

Gerald J. Gallinghouse
United States Attorney for the
Eastern District of Louisiana
500 St. Louis Street
New Orleans, Louisiana 70130

New Orleans, Louisiana, December 19, 1975.

DANIEL LUND

APPENDIX A

J. H. RUTTER REX MANUFACTURING COMPANY, INC.,

Plaintiff-Appellant,

v.

UNITED STATES of America,

Defendant-Appellee.

No. 74-2366

United States Court of Appeals,
Fifth Circuit.

June 30, 1975.

Employer brought suit under the Federal Tort Claims Act claiming that it was damaged by unreasonable delay of the National Labor Relations Board in securing compliance with a reinstatement order. The United States District Court for the Eastern District of Louisiana, at New Orleans, R. Blake West, J., 380 F.Supp. 412, dismissed the complaint with prejudice, and the employer appealed. The Court of Appeals held that even if the Board abused its discretion in delay of over four years in filing initial back pay specification against employer following enforcement of the Board's reinstatement order, where delay was caused by assignment of the matter in an understaffed office to inexperienced compliance officer who was directed to handle smaller matter first to gain experience, discretionary function exception in the Federal Tort Claims Act applied to preclude recovery by employer.

Affirmed.

1. *United States—78(12)*

In order to invoke the discretionary function exception in the Federal Tort Claims Act, it is not sufficient for the Government to demonstrate that some choice was involved in the decision-making process; the nature of the judgment must also call for the balancing of policy consideration. 28 U.S.C.A. §2680.

2. *United States—78(12)*

Even if the National Labor Relations Board abused its discretion in delay of over four years in filing initial back pay specification against employer following enforcement of the Board's reinstatement order, where delay was caused by assignment of the matter in an understaffed office to inexperienced compliance officer who was directed to handle smaller matter first to gain experience, discretionary function exception in the Federal Tort Claims Act applied to preclude recovery by employer, which claimed that unreasonable delay by the Board in securing compliance caused it damage. 28 U.S.C.A. §§1346(b), 2671 et seq., 2680(a).

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GIBSON,* THORNBERRY and AINSWORTH, Circuit Judges.

PER CURIAM:

J. H. Rutter Rex Manufacturing Company seeks to recover $144,001.24 from the United States under the Fed-

* Of the 8th Circuit, sitting by designation.

eral Tort Claims Act, 28 U.S.C. §2671 et seq. Rutter Rex claims that the National Labor Relations Board's unreasonable delay in securing compliance with a reinstatement order caused the damages. The district court below ruled on the merits that the discretionary function exception to the Tort Claims Act bars the suit. Rutter Rex challenges that here, but we agree with the district court and affirm.

On April 21, 1954 the production and maintenance workers at Rutter Rex's New Orleans plant went on a strike that lasted until April 4, 1955. During that time Rutter Rex hired replacements for many of the striking employees. The National Labor Relations Board found that the employer had committed unfair labor practices, and ordered the company to reinstate the strikers with back pay. After Rutter Rex refused voluntary compliance, the Board successfully petitioned this court for enforcement. NLRB v. J. H. Rutter-Rex Manufacturing Co., 245 F.2d 594 (5 Cir. 1957). On August 21, 1957, the Board's regional office wrote Rutter Rex offering its assistance in implementing the decree, but also stating: "When you have fully complied with the affirmative terms of the decree and there are no violations of its negative provisions, you will be notified that the case has been closed. Until you receive such notice you will know that the case remains open for all purposes as awaiting compliance." On November 4, 1961, the Board filed its first back pay specification, listing claims totalling $342,764.07 as of June 30, 1961. Rutter Rex contested that specification to the U. S. Supreme Court, but ultimately lost. *See* NLRB v. J. H. Rutter Rex Manufacturing Co., 396 U.S. 258, 90 S.Ct. 417, 24 L.Ed.2d 405 (1969). The Board then computed a supplemental back pay specification for claims accruing after June 30, 1961. A panel of our court enforced that specification in J. H. Rutter Rex Manufacturing Co. v. NLRB, 473 F.2d 223

(5 Cir. 1973), cert. denied, 414 U.S. 822, 94 S.Ct. 120, 38 L.Ed.2d 55.

Thus over a period of about twenty years, Rutter Rex has actively contested the reinstatement orders and back pay awards at every turn. The company has now filed a claim under the Federal Tort Claims Act seeking to recover $144,001.24—the claimed additional back pay liability incurred by the Board's unreasonable delay in filing the initial back pay specification.[1]

The government answered Rutter Rex's FTCA claim and moved to dismiss for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1). The trial court denied the government's motion to dismiss, and the parties submitted the case to the trial court on a lengthy set of stipulations and deposition testimony. After considering the additional materials, the trial court ruled on the merits for the United States. The trial court felt that the Board's delay in the case was "deplorable" but declined to award Rutter Rex the requested damages. The court opined that the government's decision on allocation of its enforcement case load was a discretionary act within the meaning of 28 U.S.C. §2680(a). Therefore the court ruled for the United States on the merits, and dismissed the complaint with prejudice.

The Federal Tort Claims Act, 28 U.S.C. §2671 et seq., makes a limited waiver of the government's sovereign immunity. 28 U.S.C. §2674 provides that "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the

[1] Rutter Rex computes this amount as the total back pay liability to the thirty-eight persons it had not reinstated as of the date of enforcement of the Board's order in 1957.

same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." 28 U.S.C. §2680 provides the exception to this waiver of immunity that the trial court relied on: "The provisions of this chapter and section 1346(b) of this title [the jurisdictional statute for the Federal Tort Claims Act] shall not apply to—

> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

The discretionary function exception was originally given a broad sweep in Dalehite v. United States, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953), where the Supreme Court relieved the United States of all liability for its actions in connection with the April 1947 Texas City disaster. But subsequent Supreme Court decisions substantially narrowed *Dalehite's* reading of the discretionary function exception. *See* Rayonier, Inc. v. United States, 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed.2d 354 (1957); Hatahley v. United States, 351 U.S. 173, 76 S.Ct. 745, 100 L.Ed. 1065 (1056); Indian Towing Co. v. United States, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955).

[1] The cases following *Dalehite* make clear that an absolutist interpretation of the discretionary function is improper. Smith v. United States, 375 F.2d 243 (5 Cir.), cert. denied, 389 U.S. 841, 88 S.Ct. 76, 19 L.Ed.2d 106 (1967). It is not sufficient for the government to demonstrate that some choice was involved in the decision-making

process. That showing could be made in almost every case. Pigott v. United States, 451 F.2d 574 (5 Cir. 1971). The nature of the judgment must also call for the balancing of policy considerations. Griffin v. United States, 500 F.2d 1059 (3 Cir. 1974); Moyer v. Martin Marietta Corp., 481 F.2d 585 (5 Cir. 1973).

[2] The stipulations show that the NLRB assigned the compliance phase of the Rutter Rex case to Edward Champagne two days after the panel decision enforcing the Board's order. (June 12, 1957). Champagne was told to handle the smaller Ozark Dam case first to gain experience. From June 12, 1957 through May, 1958, he spent twenty to twenty-five working days on the Rutter Rex case, then began working full time on the Ozark Dam case, completing it on March 24, 1959. From June 1, 1958 until August 31, 1959, no staff member worked on the Rutter Rex matter. Then a new compliance officer, John Immel, took over the case, and the matter received regular attention until the back pay specifications' completion on November 4, 1961.

The evidence indicated that the New Orleans NLRB office was understaffed during the relevant period. The Board elected to have new and inexperienced member Champagne "cut his teeth" on smaller compliance matters before handling the Rutter Rex case, a major back pay case. This decision clearly involved public policy considerations—balancing of various cost-benefit considerations to advance the public interest. The NLRB could clearly have thought it was in the public interest to have Champagne gain experience before taking on the Rutter Rex case to insure full compliance with the back pay order in that major case. Thus the trial court correctly held that the

discretionary function exception applied even if the NLRB abused its discretion in this case. *See* 28 U.S.C. §2680(a).[2]

Affirmed.

[2] Under 28 U.S.C. §1346(b), the United States is liable for money damages caused by the negligent actions of its employees acting within the scope of their employment "under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred." The United States argues that Louisiana tort law provides no private analogue to the present action, hence no FTCA liability. *See* Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1962). *But see* Indian Towing Co. v. United States, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955); Bankston v. United States, 480 F.2d 495 (5th Cir. 1973). Our decision on the discretion function issues make consideration of this argument unnecessary.

APPENDIX B

J. H. RUTTER REX MANUFACTURING COMPANY, INCORPORATED

v.

UNITED STATES of America.

Civ. A. No. 71-1960.

United States District Court,

E. D. Louisiana.

April 30, 1974.

An action was brought by an employer under the Federal Tort Claims Act. The District Court, R. Blake West, J., held that although unreasonable delay of the National Labor Relations Board in completing a back pay specification was inordinate and deplorable and damaged the employer in its ability to defend the specification finally filed and thereby increased the amount of required payments occasioned by delay, and such unreasonable delay was violative of the dictates of the Administrative Procedure Act, such type of claimed governmental liability fell within an exception of the Tort Claims Act and the principle of damnum absque injuria was applicable.

Judgment for the Government, and claim dismissed with prejudice.

United States—78(12)

Although unreasonable delay of National Labor Relations Board in completing back pay specification was in-

ordinate and deplorable and damaged employer in its ability to defend specification finally filed and thereby increased amount of required payments occasioned by delay, and such unreasonable delay was violative of dictates of Administrative Procedure Act, such type of claimed governmental liability involved exercise of discretion and principle of damnum absque injura was applicable. 5 U.S.C. A. §§551 et seq., 555(b); 28 U.S.C.A. §§1346, 2671 et seq., 2674, 2675, 2680, 2680(a); National Labor Relations Act, §8(a)(5), as amended 29 U.S.C.A. §158(a)(5).

ORDER

R. BLAKE WEST, District Judge.

This action, based upon the Federal Tort Claims Act, arises from a labor dispute which occurred in 1954 and which has been the subject of almost continuous litigation since that time.[1] By means of the instant lawsuit, plaintiff seeks damages allegedly occasioned by the delay of defendant's agency, the National Labor Relations Board (hereinafter the Board), in implementing the enforcement order of the Board dated February 13, 1956, which required job reinstatement to certain of the striking employees, as well as back pay to these employees. Plaintiff alleges that the Board "negligently failed and omitted to take any action" pursuant to the order until November,

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[1] See: N. L. R. B. v. J. H. Rutter—Rex Manufacturing Co., 229 F.2d 816 (C. 5, 1956); N. L. R. B. v. J. H. Rutter—Rex Manufacturing Co., 245 F.2d 594 (C. 5, 1957); N. L. R. B. v. J. H. Rutter—Rex Manufacturing Co., 305 F.2d 242 (C. 5, 1962); J. H. Rutter—Rex Manufacturing Co. v. N. L. R. B., 399 F.2d 356 (C. 5, 1968); N. L. R. B. v. J. H. Rutter—Rex Manufacturing Co., 396 U.S. 258, 90 S.Ct. 417, 24 L.Ed. 405 (1969); J. H. Rutter—Rex Manufacturing Co. v. N. L. R. B., 473 F.2d 223 (1973).

1961. Plaintiff asserts that this delay impaired its ability to defend the individual back pay claims ultimately designated in the back pay specification (filed on November 16, 1961, and supplemented on November 30, 1970) and caused the claims to increase substantially in amount during the prolonged period of delay.

After failing in an attempt to have the back pay specification reduced because of the delay (N. L. R. B. v. J. H. Rutter—Rex Manufacturing Co., 396 U.S. 258, 90 S.Ct. 417, 24 L.Ed.2d 405 (1969)), the company paid the required back pay and subsequently filed this action for damages pursuant to the Federal Tort Claims Act, 28 U.S.C. §1346, 28 U.S.C. §2674.[2]

For the following reasons, the Court is of the opinion that, despite the damages suffered by plaintiff as a result of the Board's inexcusable delay, plaintiff has no basis for recovery against defendant.

It is the position of plaintff that the Board's delay violated its duty to proceed with the reasonable dispatch required of the Board by the Administrative Procedure Act, 5 U.S.C. §555(b),[3] and that such violation renders

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[2] "§1346(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act of omission occurred."

"§2674. *Liability of United States*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . ."

[3] With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency on in an agency proceeding.

defendant liable under the Tort Claims Act.

It is the postion of defendant that the action taken by the Board (or its inaction) constituted a discretionary function of a governmental agency and therefore was not a basis for an action under the Tort Claims Act.[4]

The parties have entered into a lengthy stipulation of facts (See Appendix)*, the matter was submitted to the Court for what is hoped will be a final disposition of a case which, ". . . beclouds the highly respectable idea that all litigation must, some day, come to an end." J. H. Rutter —Rex Manufacturing Co. v. N. L. R. B., 399 F.2d 356, 357. (C. 5, 1968).

After careful consideration of the matter, it is the opinion of the Court that the delay in completing the back pay specification on the part of the Board was "inordinate"[5] and "deplorable",[6] and that plaintiff company was in fact damaged both in its ability to defend the specification finally filed and by the increased amount of the required payments occasioned by the delay. However, the Court is also of the opinion that the situation at bar is illustrative of the principle of *damnum absque injuria*. Plaintiff has failed to provide, and the Court has been

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[4] 28 U.S.C. §2680. *Exceptions.*
The provisions of this chapter and section 1346(b) of this title shall not apply to—
(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

[5] J. H. Rutter—Rex Manufacturing Co. v. N. L. R. B., 399 F.2d 356 (C. 5, 1968).

[6] N. L. R. B. v. J. H. Rutter—Rex Manufacturing Co., 396 U.S. 258, 90 S.Ct. 417, 24 L. Ed.2d 405 (1969).

* The Appendix to the district court opinion is printed in full in 380 F.Supp. at page 414 et seq.

unable to find, any authority which supports plaintiff's contention that unreasonable delay in violation of the dictates of the Administrative Procedure Act renders defendant liable in damages under the Tort Claims Act. On the contrary, it is the opinion of the Court that the action of the agency in allocating its enfrocement case load was an act of discretion within the meaning of 28 U.S.C. §2680(a). Eastport Steamship Corp. v. United States, 372 F.2d 1002, 178 Ct.Cl. 599 (1967); Coastwise Packet Co. v. United States, 398 F.2d 77 (C. 1, 1968), cert. den'd 393 U.S. 937, 89 S.Ct. 300, 21 L.Ed.2d 274 (1968).

While the length of the delay in this case was deplorable, it is the Court's opinion that it was just this type of governmental liability which the Congress sought to avoid by means of the exception contained in 28 U.S.C. §2680.[7]

For the foregoing reasons, it is ordered that judgment issue in favor of defendant, United States of America, and against plaintiff, J. H. Rutter—Rex Manufacturing Company, dismissing the claim of plaintiff with prejudice, each party to bear its own costs.

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[7] It is the Court's opinion that the creation of tort liability on the part of the government for delay by its agencies in carrying out their functions would open our already overloaded federal courts to a very substantial number of disgruntled citizens seeking damages for delays of as many sorts as could be conjured up in the minds of ingenious lawyers.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

Civil Action No. 71-1960 Section "H"

J. H. RUTTER REX MANUFACTURING COMPANY, INC.

vs.

UNITED STATES OF AMERICA

JUDGMENT

The Court having directed that judgment be entered in this matter in accordance with the Court's written opinion order on file herein;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendant, UNITED STATES OF AMERICA, and against plaintiff, J. H. RUTTER REX MANUFACTURING COMPANY, INC., dismissing said plaintiff's claim with prejudice, each party to bear its own costs.

New Orleans, Lousiana, this 30th day of April, 1974.

s/ R. BLAKE WEST

United States District Judge

Date of entry May 1, 1974.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-2366

D. C. Docket No. CA 71-1960 "H"

J. H. RUTTER REX MANUFACTURING COMPANY, INC.,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

Before GIBSON,* THORNBERRY and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

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* Of the 8th Circuit, sitting by designation.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

June 30, 1975

Issued as Mandate: Oct. 3, 1975

APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

TO ALL COUNSEL OF RECORD

No. 74-2366—J. H. Rutter Rex Manufacturing Co., Inc.
vs. U. S. A.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH, Clerk

by .....
Deputy Clerk

cc: Mr. Daniel Lund
Messrs. James D. Carriere
Gerald J. Gallinghouse

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-879

J. H. RUTTER REX MANUFACTURING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitoner brought this action against the United States under the Federal Tort Claims Act on July 19, 1971, claiming damages amounting to $128,313.49[1] for alleged negligent delay by the National Labor Relations Board in preparing two backpay specifications. The district court, on stipulated facts, held that the acts complained of came within the "discretionary function" exception of the Tort Claims Act, 28 U.S.C. 2680(a), and dismissed the complaint (Pet. App. 33-38). The court of appeals affirmed (Pet. App. 26-32). Petitioner's sole contention here is that the discretionary function exception did not bar its claim.

[1]The claim was later increased to $144,001.24 (see Pet. App. 27).

The facts are not disputed. This case is a phase of protracted litigation arising out of a strike by employees at petitioner's New Orleans, Louisiana, clothing factory in 1954. The National Labor Relations Board in 1956 found that petitioner had refused to bargain and ordered petitioner to reinstate the striking employees. 115 NLRB 388. On June 10, 1957, the Board's order was enforced by the court of appeals. 245 F.2d 594 (C.A. 5). Immediately thereafter, the Board's office in New Orleans assigned the case to Edward Champagne, a compliance attorney, who worked on it for about 25 working days between June 1957 and May 1958. He had been instructed to work full time on other matters to gain experience. No other work was done on the case until August 31, 1959, when it was re-assigned. Thereafter it received regular attention. On November 16, 1961, a 428 page backpay specification was issued covering some 207 employees for the period from five days after the date of their application for reinstatement to June 1961. After an extensive hearing,[2] the Board in June 1966 ordered total backpay of $160,894 for 172 employees whom petitioner had refused to reinstate. In 1968, the court of appeals modified this order because of the Board's delay (399 F.2d 356 (C.A. 5)), but in December 1969 this Court reversed. *National Labor Relations Board* v. *J. H. Rutter Rex Mfg. Co., Inc.*, 396 U.S. 258.

Thereafter, in November, 1970, the Board's regional office prepared a supplemental backpay specification for claims accruing after June 1961. In November 1971, the Board ordered supplemental backpay to 33 employees, in the aggregate amount of $53,078. The court of appeals enforced this order except for one remanded claim. 473 F. 2d 223 (C.A. 5). This Court denied certiorari. 414 U.S. 822.

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[2]Petitioner unsuccessfully sought to enjoin those proceedings. 305 F. 2d 292 (C.A. 5).

In July 1971, petitioner commenced the present action against the United States under the Federal Tort Claims Act, contending that it had sustained damages in the amount of $75,309 as a result of delay by the Board in issuing its November 1961 backpay specification, and $53,004 (plus interest) as a result of delay in the November 1970 backpay specification.[3]

The courts below correctly held that the alleged unreasonable delay by the National Labor Relations Board came within the exception in the Tort Claims Act for "[a]ny claim * * * based upon the exercise or * * *failure to exercise * * * a discretionary function * * * whether or not the discretion involved be abused." 28 U.S.C. 2680(a). When and how to devote limited resources to a particular investigation is clearly a "determination made by executives or administrators in establishing plans, specifications or schedules of operations." *Dalehite* v. *United States,* 346 U.S. 15, 35-36, 42. The decision below does not conflict with that of any other court of appeals. The few other cases discussing the issue have reached the same result. *E.g., Coastwise Packet Co.* v. *United States,* 398 F. 2d 77 (C.A. 1), certiorari denied, 393 U.S. 937. See also *Eastport Steamship Corp.* v. *United States,* 372 F.2d 1002, 1010-1011 (Ct. Cl.).[4]

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[3]These figures were later changed to $108,913.99 and $35,087.25, respectively.

[4]Petitioner's reliance (Pet. 11-12) on the requirement in the Administrative Procedure Act that agencies act within a reasonable time (5 U.S.C. 555(b)) is misplaced. The question here is whether the timing of the agency's compliance action is discretionary, not whether the agency complied with Section 555(b). See *National Labor Relations Board* v. *J. H. Rutter Rex Mfg. Co., Inc., supra,* 396 U.S. at 266 n. 3. The remedy for unreasonable delay in agency action is by a proceeding under 5 U.S.C. 706(1).

As the court of appeals explained (Pet. App. 31; footnote omitted):

> The evidence indicated that the New Orleans NLRB office was understaffed during the relevant period. The Board elected to have new and inexperienced member Champagne "cut his teeth" on smaller compliance matters before handling the Rutter Rex case, a major back pay case. This decision clearly involved public policy considerations—balancing of various cost-benefit considerations to advance the public interest. The NLRB could clearly have thought it was in the public interest to have Champagne gain experience before taking on the Rutter Rex case to insure full compliance with the back pay order in that major case. Thus the trial court correctly held that the discretionary function exception applied even if the NLRB abused its discretion in this case. See 28 U.S.C. §2680(a).[5]

This analysis is firmly grounded in considerations of public policy. As the district court noted in its opinion, "the creation of tort liability on the part of the government for delay by its agencies in carrying out their functions would open our already overloaded federal courts to a very substantial number of disgruntled citizens seeking damages for delays of as many sorts as could be conjured up in the minds of ingenious lawyers" (Pet. App. 37, n. 7).

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[5]The court need not consider petitioner's contention that there are two interpretations of the discretionary function exception, since, under any theory, the assignment of limited personnel to deal with a heavy case load is a discretionary planning function. Compare the *ad hoc* balancing test applied by the Fifth Circuit in *Smith* v. *United States*, 375 F. 2d 243, with the Fifth Circuit's analysis in this case.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.